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Nos. 87-1487, 87-1506, 87-1510, and 87-1551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et al.*,
Respondents,

CORPORATION FOR PUBLIC BROADCASTING, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et al.*,
Respondents,

NATIONAL ASSOCIATION OF BROADCASTERS,
Petitioner,

v.

CENTURY COMMUNICATIONS CORPORATION, *et al.*,
Respondents,

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.,
Petitioner,

v.

CENTURY COMMUNICATIONS CORPORATION, *et al.*
Respondents.

On Petitions for Writs of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

JOINT REPLY BRIEF OF PETITIONERS NAB AND INTV

[Counsel For Individual Petitions Listed on Inside Front Cover]

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

Of Counsel:

HENRY L. BAUMANN
BENJAMIN F.P. IVINS
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036

MICHAEL S. HORNE*
STEVEN F. REICH
COVINGTON & BURLING
1201 Penn. Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioner National Association of Broadcasters

J. LAURENT SCHARFF*
JAMES M. SMITH
ROBERT J. AAMOTH
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566

Attorneys for Petitioner Association of Independent Television Stations, Inc.

* Counsel of Record

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JOINT REPLY BRIEF OF PETITIONERS NAB AND INTV

Less than three years ago the Solicitor General urged this Court not to address what he characterized as the "sensitive constitutional issues" posed by the then only lower court decision to hold that the FCC's longstanding "must carry" rules were invalid under the First Amendment. Memorandum for the Federal Respondents, p. 5, November 1985, in *National Association of Broadcasters* v. *Quincy Cable TV, Inc.*, 476 U.S. 1169 (1986) (No. 85-502). At that time the Solicitor General argued that: (1) the lower court had left open the possibility that the FCC could craft new rules that the Court of Appeals would accept, (2) the FCC had concluded that it preferred to explore the possibility of such new rules rather than seeking to overturn the lower court decision and had recently issued a rulemaking notice to that effect and (3)

> "[i]f the Commission issues new must-carry rules, the constitutionality of those rules will be addressed by the court of appeals in the first instance. This Court then would have an opportunity to consider the issues raised by petitioners in the context of rules that the FCC considers necessary to further the public interest."

Id. at pp. 4-5. Some six months later, this Court denied the petition in that 1985 case. *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). Now the Solicitor General's 1985 prerequisites to review by this Court of the underlying "sensitive constitutional issues" have all been realized. The FCC devoted much of 1986 and the first half of 1987 to an effort to craft new must carry rules it thought would satisfy the *Quincy* panel. The constitutionality of those new rules has now been

addressed by the D.C. Circuit in the first instance. And so, this Court now has the opportunity to consider the "sensitive constitutional issues" raised by the *Quincy* petitioners, this time "in the context of rules that the FCC considers necessary to further the public interest."

Nonetheless, the Solicitor General has decided not to follow the recommendation of the FCC to seek a writ of certiorari and counsels once again against review by this Court, even though he evidently would contend that the lower court was clearly wrong in the way it applied the *O'Brien* test.[1] He asserts that the present case does not have "sufficient practical importance or legal significance" and amounts to only a "limited legal dispute" not warranting this Court's attention. Memorandum for the Federal Respondents, pp. 2, 5, May 1988.

Such a characterization of this case by the Solicitor General is puzzling. The lower court has now twice declared unconstitutional longstanding FCC rules which this Court previously held the agency had the statutory authority to adopt. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). Thus the lower court's result is tantamount to one of those relatively

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[1] United States v. O'Brien, 391 U.S. 367 (1968). The Solicitor opines that the "court of appeals may have imposed an excessively stringent evidentiary burden on the Commission to justify its [new] interim must-carry rules" citing two recent decisions of this Court. Memorandum for the Federal Respondents, pp. 2, 5, May 1988. Although called to the lower court's attention, those two cases were simply ignored by the D.C. Circuit. *See* NAB Pet., pp. 23-24; INTV Pet., pp. 20-21. Apparently in the D.C. Circuit, as matters now stand, United States v. Albertini, 472 U.S. 675 (1985), and Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984), have no force or effect.

infrequent decisions in which Federal legislation is held unconstitutional, and as to which there is a strong presumption in favor of review by this Court. *Cf.* 28 U.S.C. § 2101(a) (1982).

If the only issue presented by the petitioners in this case were the lower court's refusal to follow this Court's recent precedents applying *O'Brien*, perhaps a summary reversal and remand on the certiorari papers might well be more efficient than plenary review by this Court. But serious though it certainly is, the lower court's failure to follow this Court's recent teachings concerning the *O'Brien* standard is by no means the only or even most important issue raised by the petitions in the instant case. In addition, there are those "sensitive constitutional issues," as the Solicitor characterized them in November, 1985, pertaining to Federal authority to regulate the use of broadcast signals by cable television systems, which the lower court's decision in this case once again poses.[2]

The Solicitor General also counsels against review in this case on the basis of a now all too familiar refrain: The lower court's decision addresses rules that were only "interim" in nature,[3] and does not

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[2] *See* Pet. App., pp. 14a-18a; NAB Pet., pp. i, 11-21; UCC Pet., pp. i, 17-23; *see also* Joint Pet. of NAB and Association of Maximum Service Telecasters, Inc., pp. i, 8-18, Sept. 23, 1985, in National Association of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986) (No. 85-502).

[3] The FCC's new rules were scheduled to remain in effect for five years, until June 10, 1992.

prohibit an FCC attempt to develop yet another set of must carry rules through yet another rulemaking proceeding that might pass muster in the court of appeals; indeed, the FCC has initiated an inquiry to collect data regarding the availability of broadcast signals on cable television systems in the wake of the elimination of the Commission's must carry rules. May 1988 Memorandum, p. 7.[4]

The principal flaw in this argument is that *Quincy* and now its progeny constitute a serious impediment to sound policymaking, whether by the FCC or by Congress, because both those bodies must assume, until this Court resolves the matter, that the D.C. Circuit's view of the First Amendment is correct. Indeed, in this very case the FCC's effort to accommodate *Quincy* became the basis on which the lower court overturned the new rules. From the outset to the conclusion of its 1986-87 rulemaking the FCC struggled to find a rationale for regulation that the *Quincy* panel might accept.[5] Ultimately it concluded, rightly or wrongly, that *Quincy* dictated adoption not

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[4] As the FCC's recent *Notice* makes clear, the effort to gather additional data pertaining to must carry stems from a Congressional request that the agency undertake that information-collecting task. That request is only one manifestation of ongoing Congressional interest in the must carry issue. *See also* H.R. 4293, 100th Cong., 2d Sess. (1988). But the FCC *Notice* provides no indication that the FCC, like the hapless but ever optimistic would-be place kicker in the comic strip, is willing to run up to the ball once again based on the assurances of the impish little girl that next time she might not yank the football away at the last moment. Even if the FCC were willing to try again, it ought to do so with a definitive resolution of the constitutional issues that only this Court can provide.

[5] *See* INTV Pet., pp. 23-25.

only of rules that were much narrower substantively, but also that would have only a limited duration.[6] To justify rules of limited duration, the FCC theorized that must carry requirements could become unnecessary if cable television subscribers received "consumer education" notices and A/B switches from cable companies, even though the Commission had found A/B switches inadequate only two years earlier. The FCC explained this conversion by citing its "search for acceptable solutions . . . in the post-*Quincy* environment." Pet. App., p. 127a. The FCC also read *Quincy* as requiring the agency to forsake entirely its longstanding rationale for must carry rules—*i.e.*, the agency's statutory responsibility to foster and safeguard the public's unfettered access to locally oriented television broadcast service. The FCC certainly can be accused of being too optimistic in relying upon A/B switches and in hoping that cable companies, entities that have every economic incentive to perpetuate dependence on cable reception, could be compelled to eliminate that dependence.[7] But standing alone, the FCC's suppositions along these lines were harmless enough because when the FCC's hopes proved to be misplaced, new regulatory action could be taken to extend the rules beyond the initial five-year period.

The Court of Appeals, however, treating as established fact the FCC's suppositions about the possibility of overcoming the competitive disadvantage imposed on broadcast stations that are excluded from cable retransmission, and freely substituting its own predictive judgments and findings of fact for those

[6] Pet. App., pp. 151a-154a, 247a-248a.

[7] *See* INTV Pet., pp. 26-27.

of the agency on other issues, found the so-called interim rules unconstitutional.

The ironic aspects of this spectacle, however, are more than offset by the sobering consequences for the American public, and for what is "demonstrably a principal source of information and entertainment for a great part of the Nation's population." *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 177 (1968). Cable television systems—on which over half the American public now relies for television reception—stand as a gateway between their customers and each and every one of the local television broadcast stations licensed to serve the public. Any broadcast station that is not carried on cable is at a severe competitive disadvantage vis-a-vis other broadcast stations and such other sources of television news and information as the cable operator may select for transmission into American homes. Only four years ago this Court observed that the must carry rules addressed this important issue by "attempt[ing] to strike a balance between protecting noncable households from loss of regular television broadcasting service due to competition from cable systems and ensuring that the substantial benefits provided by cable of increased and diversified programming are secured for the maximum number of viewers." *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1984).

Although the lower court stated that it has not created a totally impenetrable barrier to governmental regulation aimed at limiting the power of cable operators to act as private censors of local commercial and noncommercial educational television service,

Quincy and the decision below greatly complicate the task of the FCC and those in Congress who see the better policy as one which assures the availability of multiple sources of television service which are not dependent on cable television operators for access to viewers. The D.C. Circuit's barriers to regulation rest on a suspect platform, one that is inconsistent with numerous decisions of this Court[8] and in direct conflict with a prior Eighth Circuit decision which this Court later described as having "correctly upheld" the must carry rules in the face of a First Amendment challenge.[9] The issues raised by the petitions have enormous public importance. Those issues are not likely to go away, because both the FCC and the Congress must continue to be concerned with the threat posed by any enterprise that becomes a single source for television service in the United States. To date the FCC, the Congress and the public have not had the benefit of an authoritative resolution of the

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[8] *See* INTV Pet., pp. 12-16, 20-21; NAB Pet., pp. 12-19, 22-24; UCC Pet., pp. 18-23; CPB Pet., pp. 14-21, 25-26.

[9] United States v. Midwest Video Corp., 406 U.S. 649, 659 n.17 (1972) (plurality opinion). The Solicitor urges that there is no conflict with Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968), because subsequently the Eighth Circuit "cast doubt" on its *Black Hills* decision. May 1988 Memorandum, p. 5, n.5. However, the Eighth's Circuit's subsequent discussion of *Black Hills* was in the context of regulations mandating cable access for nonbroadcast services; the Eighth Circuit held that such rules were outside the FCC's statutory authority because they bore no nexus to broadcast signal retransmission which *was* within the FCC's authority. *See* Midwest Video Corp. v. FCC, 571 F.2d 1025, 1054 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979). This Court also recognized that critical distinction in affirming the Eighth Circuit. *See* 440 U.S. at 700.

underlying constitutional issues, and only this Court can provide that resolution.

Respectfully submitted,

Of Counsel:

HENRY L. BAUMANN
BENJAMIN F.P. IVINS
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036

MICHAEL S. HORNE*
STEVEN F. REICH
COVINGTON & BURLING
1201 Penn. Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioner National Association of Broadcasters

J. LAURENT SCHARFF*
JAMES M. SMITH
ROBERT J. AAMOTH
PIERSON, BALL & DOWD
1200—18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566

Attorneys for Petitioner Association of Independent Television Stations, Inc.

*Counsel of Record

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